BAN HIN LEE BANK BHD

v.

PANG LAI HIN

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[KOD NO: S2-24-554-1998]
14 JANUARY 1999

LAND LAW: *Sale of land - Sale of land, application for - Notice of demand - Whether invalid - Whether plaintiff could rely on conclusive evidence clause - Whether plaintiff succeeded in showing cause to the contrary*

LAND LAW: *Charge - Interest - Absence of provision in charge and annexure for imposition of interest - Absence of Facilities Agreement as evidence to show proof thereof - Whether plaintiff entitled to charge interest - Whether Letter of Offer sufficient*

CIVIL PROCEDURE: *Affidavits - Affidavit in support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1*

This was an application by the plaintiff for an order of sale of the defendant's land. The plaintiff had granted a housing loan facility of RM80,000 to the defendant and the defendant had charged her said land as security. The defendant defaulted in her instalment payments and this led to the instant application.

The defendant argued that the effective date of the implementation of interest stated in the notices of demand sent to the defendant differed from that stated in the originating summons. As such, she was entitled to ignore the said demands. The plaintiff attributed this to a typographical and clerical mistake. Also, the plaintiff relied on cl. 50 of the charge annexure, *ie*, the conclusive evidence clause wherein the parties agreed that a certificate of indebtedness by the manager or an authorised officer of the bank shall not be questioned on any account whatsoever. Apart from this, the issues were whether the plaintiff could charge interest of 2.35% per annum above the plaintiff's base lending rate ('BLR') of 12.25% per annum, and whether the affidavit in support of the plaintiff's originating summons was admissible as the said affidavit was affirmed before the originating summons.

Held:

[1] The allegation that there was a typographical and clerical mistake was only made in submission and was unsupported. On this issue alone, the defendant succeeded in showing cause to the contrary.

[2] The statement of account or the certificate of indebtedness did not provide the plaintiff a blanket coverage. Since a manifest error in both the notices of demand and in Form 16D was shown, the challenge to the effectiveness of the conclusive evidence clause was well and truly shaken.

[3] A study of both the charge and the annexure showed that there was no provision for the imposition of any interest nor was it stated the amount of interest chargeable. Further, the Facilities Agreement wherein the plaintiff agreed to grant the banking facilities and which was incorporated into and formed part of the charge, was not brought as evidence to show proof that the plaintiff was entitled to charge interest of 2.35% per annum above the plaintiff's BLR of 12.25% per annum. The Letter of Offer alone was not sufficient since the charge annexure specifically referred to the Facilities Agreement and not to the Letter of Offer. On this ground too, the defendant succeeded in showing cause to the contrary.

[4] The affidavit-in-support of the plaintiff's originating summons was not admissible as it was affirmed before the filing of the said originating summons *[Arab Malaysian Finance Berhad v. Serajudin Mohd Ismail]*.

[Application dismissed.]

Case(s) referred to:

Arab Malaysian Finance Berhad v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(foll)***

Cheng Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***

Credit Corp (M) Bhd v. Lucky Heights Development Sdn Bhd & Ors [1996] 4 MLJ 556 ***(refd)***

Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 ***(refd)***

Lien Chong Credit & Leasing Sdn Bhd v. Sri Saga Holdings Sdn Bhd & Ors [1996] 4 CLJ 168 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 253(1), 256(3)

Rules of the High Court 1980, O. 1 r. 4, O. 2 r. 1, O. 41 r. 4

For the plaintiff - KL Teh; M/s Ng Yook Woon, Andrew TC Saw & Company
For the defendant - Eugene Lee; M/s CY Yap & Lee

Reported by Kavitha Gunasegaran

JUDGMENT

RK Nathan J:

Facts

The plaintiff had agreed to grant a housing loan facility of RM80,000 to the defendant. A letter of offer dated 27 May 1995 was duly signed by the defendant on 1 August 1995. As security, the defendant created a First Party Legal Charge dated 15 January 1996 on the whole of the land held under PN No. 653 (H.S.(D) 20461) No. Lot 37813, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan (the said land). The said memorandum of charge was duly registered with the Registrar of Titles on 2 February 1996.

The defendant defaulted on her instalment payments entitling the plaintiff to recall the housing loan facility and to demand for the whole of the outstanding sum due together with interest.

The plaintiff issued a notice of demand dated 8 May 1998 to the defendant to recall the housing loan facility. As the defendant failed to remedy the breach, a statutory notice in Form 16D was issued on 20 May 1998 and served on the defendant on 27 May 1998 by leaving the said notice together with a covering letter dated 20 May 1998 in a sealed envelope in the post box at the last known address of the defendant. As the defendant had again failed to remedy the breach, the plaintiff proceeded by way of this originating summons for an order for sale.

Could The Plaintiff Apply For An Order For Sale?

There is no doubt that pursuant to s. 256(3) of the National Land Code (NLC) the court "shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary". In *Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 the Federal Court said at p. 388:

> It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order to sale nor would the court without scrutiny allow his application. The court must decide whether there are circumstances in the case before it which would amount to a 'cause to the contrary' within the meaning of sub-s (3) which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved.

No doubt there was default on the part of the chargor in this case which entitled the plaintiff to act upon the charge to apply for foreclosure of the property. It therefore behoves the defendant to indicate if there is any "cause to the contrary".

Invalid Notice Of Demand

The plaintiff's notice of demand (exh. B to the affidavit in support of the application) dated 8 May 1998 states that the interest charged was at the rate of 2.35% per annum above the plaintiff's base lending rate (BLR) of 12.25% per annum effective from 7 May 1998. Further exh. D (also annexed to the same affidavit) which is the Form 16D, also refers to the effective date as 7 May 1998. However, the originating summons (encl. 1) refers to the effective date as being 6 May 1998.

It was the argument of the defendant that assuming the correctness of exhs. B and D, it would mean therefore that the plaintiff was claiming a sum it was not entitled in law under the present application. Alternatively, the defendant argued that since the demands by the plaintiff were erroneous, she was entitled to ignore the said demands.

In response the plaintiff argued that in her reply-affidavit the defendant had merely stated that the demands and interest were incorrect without descending to any particulars. In support the plaintiff relied on the Court of Appeal decision in *Lien Chong Credit & Leasing Sdn Bhd v. Sri Saga Holdings Sdn Bhd & 2 Ors* [1996] 4 CLJ 168; [1996] 3 AMR 3466. In that case the defence was a mere denial of the allegations contained in the statement of claim and in allowing the plaintiff's appeal, the Court of Appeal held that the trial judge had incorrectly held that the interest payable was excessive, even though there was no affidavit to that effect, and therefore the appellate court granted summary judgment. In my view this case does not assist the plaintiff. Whilst the defendant had admittedly not referred specifically to the errors in the originating summons and in both the demands in respect of the effective date of the implementation of the interest, the very documents the plaintiff is relying on show the discrepancy. In fact in its submission the plaintiff admits that the effective date was 6 May 1998 and not 7 May 1998 as stated in the notice of demand and in the statutory notice of demand, that is, the Form 16D. The plaintiff attributes this as a typographical and clerical mistake.

I have to reject this plea. Firstly there was no affidavit either by the plaintiff or its solicitors attributing the error to a typing or clerical mistake. Secondly, even if there was such an affidavit the question is whether any rectification could be made in the Form 16D. For the moment and in respect of this case the allegation that there was a typographical and clerical mistake is only made in submission and is unsupported.

On this issue alone I find that the defendant has succeeded in showing "cause to the contrary".

Conclusive Evidence Clause

The plaintiff relied on cl. 50 of the annexure to the charge which is the conclusive evidence clause, wherein the parties agreed that a certificate of indebtedness by the manager or an authorised officer of the bank shall be accepted by the defendant as final and conclusive "for all purposes whatsoever including for purposes of legal proceedings and shall not be questioned on any account whatsoever". In respect of such a clause I had said in *Credit Corp (M) Bhd v. Lucky Heights Development Sdn Bhd & Ors* [1996] 4 MLJ 556 at p. 564:

> ... no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors.
>
> ... I hold that the presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them ...

The Court of Appeal in *Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 MLJ 363 CA expressed its binding view on the effectiveness of the conclusive evidence clause through the judgment of Mahadev Shankar JCA at p. 369 as follows:

> ... even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that there is a manifest error on the face of the certificate or fraud. The initial onus is on the guarantors. The court is not bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate, it should not accept the certificate as conclusive.

In the circumstances it is my judgment that the statement of account or the certificate of indebtedness does not provide the plaintiff a blanket coverage. Since, as in this case, a manifest error, in both the notice of demand and in Form 16D, has been shown, the challenge to the effectiveness of the conclusive evidence clause has been well and truly taken.

Can The Plaintiff Actually Charge The Interest?

It is patently clear that the plaintiff's right to proceed with the order for sale arises from its statutory right as provided in s. 253(1) of the NLC and the plaintiff's exercise of its statutory right stems from the charge and its annexure.

A study of both the charge and the annexure shows that there is no provision for the imposition of any interest nor does it state the amount of interest chargeable.

However, cl. 1(a) of the annexure refers to a facilities agreement made between the plaintiff and the defendant chargor whereby the plaintiff agreed to grant banking facilities of up to an aggregate principal sum of RM80,000 as stated in item 4 of the First Schedule upon the terms and subject to conditions therein contained. Clause 4 of the facilities agreement stipulates "that the facilities agreement shall be deemed to be incorporated into and form part of the charge ..."

The plaintiff has however not exhibited the said facilities agreement. It is my judgment therefore that in the absence of this all important facilities agreement as evidence, the plaintiff has failed to show proof that he is entitled to charge interest of 2.35% per annum above the plaintiff's BLR of 12.25% per annum.

Although the plaintiff has exhibited its letter of offer dated 27 July 1995 it is my judgment that this alone is not sufficient since the charge annexure specifically refers to the facilities agreement and not to the letter of offer. On this ground too, I hold that the defendant has succeeded in showing "cause to the contrary".

Admissibility Of Encl 2

The defendant took issue with the fact that the affidavit (encl. 2) in support of the plaintiff's originating summons was affirmed on 22 June 1998 whereas the originating summons was filed on 24 June 1998. In *Arab Malaysian Finance Berhad v. Serajudin Mohd Ismail & Anor* [1999] 1 AMR 118 I had said in respect of affirming an affidavit before filing the originating summons, as follows at p. 120:

> With respect, I am of the view that specific attention ought to be given to Order 41 r. 1 of the RHC which reads:
>
> (1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.
>
> (3) ...

In other words an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is a vital factor that must be present; and before a case number is given to that particular cause or matter it must comply with O. 1 r. 4 of the RHC which defines a 'cause book' as a book kept in the Registry in which the number of, and other details relating to, a cause or matter are entered. Therefore where as in this case an affidavit has been affirmed exactly one week before the OS was filed, surely the said affidavit cannot be said to have been affirmed in a cause or matter because properly speaking there was no cause or matter that had been registered at the Registry. Whilst I agree that in so far as interlocutory or *ex parte* applications are concerned, the courts have accepted the affidavit affirmed prior to the filing of the application on the express undertaking of counsel to reswear the said affidavit, but in the present case where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view it is a nullity as it supports a non-existent cause or matter. In other words, the affidavit is 'still-born' and no resuscitative procedure by way of O. 2 r. 1 of the RHC which relates to the liberal stand taken by the courts in respect of non-compliance of the rules, can breathe life into the 'still-born'. It remains a nullity. In the circumstances, even O. 41 r. 4 of the RHC which read,

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

cannot save the day for the plaintiff.

Even on this issue the defendant will succeed.

I therefore have no hesitation in dismissing this application with costs.